

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	EB Docket No. 02-21
)	
PENINSULA COMMUNICATIONS, INC.)	
)	File No. EB 01-IH-0609
Licensee of stations)	FRN: 0001-5712-15
KGTL, Homer, Alaska;)	Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;)	86717
KWVV-FM, Homer, Alaska; and)	52145
KPEN-FM, Soldotna, Alaska.)	52149
)	
Licensee of FM translator stations)	
K292ED, Kachemak City, Alaska;)	52150
K285DU, Homer, Alaska;)	52157
K285EG and K272DG, Seward, Alaska)	52158 and 52160
)	
Former Licensee of FM translator stations)	
K285EF, Kenai, Alaska;)	
K283AB, Kenai/Soldotna, Alaska;)	
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	
K272CN, Homer, Alaska; and)	
K274AB and K285AA, Kodiak, Alaska)	

To: The Commission

COMMENTS OF PENINSULA COMMUNICATIONS, INC.

Peninsula Communications, Inc., (hereafter "PCI"), by its attorney and in response to the informal request by the Office of General Counsel, hereby respectfully submits these comments on the arguments raised in the comments filed by the Enforcement Bureau ("EB") and KSRM, Inc. ("KSRM") on the applicability to this proceeding of new section 307(f)(2) and the new language in section 312(g) of the Communications Act of 1934, as amended. The EB and KSRM comments were submitted in response to the Request to Reopen the Record and for Official Notice, filed December 14, 2004, by PCI. PCI respectfully submits the following.

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1. On December 8, 2004, President George W. Bush signed H.R. 4818, the Consolidated Appropriations Act, 2005, and it was duly enacted into law. The Consolidated Appropriations Act of 2005 contains, *inter alia*, TITLE IX—Satellite Home Viewer Extension and Reauthorization Act of 2004. Section 213 to Title IX, as enacted into law, modifies the Communications Act of 1934, as amended, as follows¹:

Section 307 Licenses

(c)(3) Continuation pending decision.

Pending any administrative or judicial hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 or section 402 of this title, the Commission shall continue such license in effect.

(f) Notwithstanding any other provision of law, (1) any holder of a broadcast license may broadcast to an area of Alaska that otherwise does not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery even if another holder of a broadcast license begins broadcasting to such area, (2) any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery may continue providing such service even if another holder of a broadcast license begins broadcasting to such area, and shall not be fined or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.

Sec. 312. Administrative sanctions

(g) Limitation on silent station authorizations

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary; except that the Commission may extend or reinstate such station

¹ Since the new language has not been published, PCI has constructed the changes as it believes the statutes now read.

license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.

Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

I. BACKGROUND FACTS

3. It is an undisputed fact that each of the above-captioned PCI stations are licensed to operate in the State of Alaska. It is equally clear that the licenses for FM full-power stations KWVV-FM, Homer, Alaska, and KPEN-FM, Soldotna, Alaska, were revoked in the *INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL*, FCC 03D-01, released on June 19, 2003 (hereafter the "ID").² In the ID, Judge Sippel took no further action against the seven (7) translators that had been "terminated" by the Commission previously³, noting:

The licenses for the seven FM translator stations were terminated by the *Termination Order* released on May 18, 2001, and the D.C. Circuit has upheld the *Termination Order*. As a result, the contingent return of the seven FM translator licenses provided for in the *OSC* is moot. (*ID* at page 30, footnote 26)

4. It is equally undeniable that the termination and revocation sanctions issued against the PCI licenses in the ID and the *Termination Order* were taken pursuant to "... a proceeding related to broadcasting via translator, microwave, or other alternative

² ORDER. IT IS ORDERED that licenses held by Peninsula Communications, Inc. for FM full-power stations KWVV-FM, Homer and KPEN-FM, Soldotna ARE REVOKED. (*ID* at page 30)

³ K285EF, Kenai, Alaska; K283AB, Kenai/Soldotna, Alaska; K257DB, Anchor Point, Alaska; K265CK, Kachemak City, Alaska; K272CN, Homer, Alaska; and K274AB and K285AA, Kodiak, Alaska

signal delivery...”⁴ Specifically, the proceeding was undertaken pursuant to the *Order to Show Cause*, 17 F.C.C. Rcd 2838 (2002) (“OSC”) in which the designated issue for evidentiary hearing was:

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.’s operation of former FM translator stations 285EF, Kenai; K283AB Kenai/Soldotna; K257DB Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission’s order in *Peninsula Communications, Inc.*, 16 F.C.C. Rcd 11364 (2001), and related violation of § 416(c) of the Act; (ID at page 2)

Had there been no PCI FM translators in operation in Alaska, there would have been no basis to hold the hearing proceeding that resulted in the license revocations and the earlier license terminations.

5. Moreover, the proceeding was commenced pursuant to the administrative sanctions provisions of Section 312 of the Communications Act of 1934, as amended, to “...determine whether all broadcast licenses held by PCI should be revoked...”⁵ The recently enacted modification in the administrative sanctions in Section 312 of the Act requires nothing short of the reinstatement of all of the PCI licenses, and the final termination of this proceeding.

II. THE CONGRESSIONAL MODIFICATION OF SECTION 312(g)

6. As noted, Section 312 (g) was modified, *inter alia*, to include the following language:

⁴ This newly enacted language is the only precondition to the reinstatement of the license under Section 312(g).

⁵ ID at page 1.

Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated.

The language is clear and unequivocal. If “any” license for a broadcast station in Alaska has been revoked or terminated in an FCC proceeding “related” to the operation of a translator station, that license is *ipso facto* reinstated without the need for any further action by, or without any discretion given to, the Commission . This provision does not place any preconditions on the reinstatement of such a license other than it must be for a (1) station in Alaska; and (2) for which the license was either revoked or terminated; and (3) in connection with a translator matter. Moreover, the reinstatement is not limited to translator licenses, since “any broadcast license” presumably and presumptively means “any”, i.e. AM, FM, translator, booster, or other broadcast license that has been terminated or revoked.

7. The EB Comments do not dispute this analysis, but are limited to a discussion of the applicability of the changes to Section 307 of the Act to the PCI matter. The meaning and effect of the language in Section 312(g) is apparently so clear and plain in its meaning and effect that the EB chose not to contest its applicability to the PCI licenses in this proceeding.

8. KSRM candidly admits in its Comments that “...the second sentence [of revised 312(g)] **requires** reinstatement, no matter what the underlying circumstances might have been and despite any other independent reason for refusing licensure.” KSRM is correct that reinstatement is required, but it fails to understand that such reinstatement is only applicable in the limited circumstance of the termination or

revocation of a broadcast license in Alaska based on a proceeding involving a translator, such as the one in which PCI has been embroiled for the past ten (10) years.

9. PCI submits that what both the EB and KSRM construe as obvious based on the plain meaning of Section 312(g), the Commission should find to be equally obvious in executing its duty to enforce that provision of the Communications Act.....the required reinstatement of all of the revoked and terminated PCI broadcast licenses. Section 312(g) is not discretionary, but mandatory in requiring that revoked and terminated licenses such as PCI's are "reinstated" by act of Congress. Its mandatory message could not be clearer.

III. THE CONGRESSIONAL MODIFICATIONS OF SECTION 307(f)

10. The EB maintains that under the "plain language" of new subsection 307(f) PCI would be exempt from license revocation only if the areas where it provided translator service in violation of the Commission's Termination *Order* are areas in which it has "broadcast to an area of Alaska that did not have access to over the air broadcasts." The EB's view is that the scope of the change in the statute is severely limited to only areas completely "unserved" by any broadcast station and argues that PCI"...provides no evidence to demonstrate that it fits within the language of the statute, but to the contrary, the record evidence in this proceeding shows that PCI did not provide the first broadcast service in any of the areas served by the translators ordered off the air by the Commission in May 2001."⁶

11. A "plain language" analysis of revised Section 307(f) reveals that the term "unserved" is not to be found anywhere in the statute. In describing the applicable

⁶ Moreover, the Presiding Judge found that certain PCI translators did indeed serve

areas of service that are the subjects of the change, the statute uses the phrase "...area of Alaska that otherwise does not have access to over the air broadcasts." Broadcasts is a plural term meaning any area that does not receive multiple broadcast signals, or an "underserved area." In the case of all of the PCI translators, they were initially authorized to operate in such "underserved areas" under a waiver policy outlined initially in *Wrangell Radio Group, Inc.* Had the Congress intended for Section 307(f) to be solely applicable to "unserved" areas, it would undoubtedly have used that term in the modification to the statute. It did not do so, and the EB's attempt to read this limitation into the statute is as disingenuous as it is erroneous.

12. The EB understands the difference between "unserved" and "underserved". It made that distinction clear in the cases in which it granted waivers for the operation of FM translator stations in Alaska under the "underserved" criteria in *Wrangell Radio Group, Inc.*, as it did in the case of all of the seven PCI translators. Thus, in the first letter sent to PCI in 1995 at the commencement of this proceeding, the Commission acknowledged that it had granted the translator licenses to PCI based on the lack of multiple broadcast services provided to small Alaska communities, in stating:

The Commission has on a number of occasions recognized the unique nature of the communications industry in Alaska and the distance lack of adequate communications services in the state. In *Wrangell Radio Group*, 75 FCC 2d 404 (1979), the Commission granted applications proposing satellite-fed TV translators in seven Alaska communities. The Commission based its decision on the need for additional over-the-air broadcast signals to serve small, isolated communities in the state, and the fact that without special consideration for the implementation of service, **many of these Alaskan communities would be without off-the-air broadcast service as we know it in the lower 48 states.**⁷

"unserved" areas when originally licensed. ID at page 5, footnote #6.

⁷ See Attachment A hereto for the March 4, 1995 letter from the Audio Services Bureau that began this proceeding, and from which this language is drawn.

13. Presumably, in attempting to provide Alaska with “off-the-air broadcast service as we know it in the lower 48 states” the Commission was not referring to providing only a single broadcast service to these communities. *CF.* 47 USC 307(b). Rather, the intent was to provide Alaskan communities with multiple broadcast voices. Section 307(f), as modified by the Congress, mandates the implementation of multiple broadcast voices in Alaska by prohibiting the Commission from terminating the operation of translators such as PCI’s even though other broadcast stations serve the same area, and by prohibiting a licensee such as PCI from being fined by the Commission “...or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.”⁸ Not only does Section 307(f) encompass the PCI matter, to the best of PCI’s knowledge and belief it is the only matter that is encompassed by this statutory provision to this point.⁹

IV. THE CONGRESSIONAL MODIFICATIONS OF SECTION 307(c)(3)

14. As noted previously, and as the record herein clearly supports, all of the sanctions issued against PCI in the course of this proceeding stem directly from its refusal to discontinue the operation of its 7 translators after being instructed to do so by the

⁸ On February 6, 2002, the Commission released its *Forfeiture Order*, 17 F.C.C. Rcd 2832 (2002). PCI was assessed a forfeiture of \$140,000.00 for its continued operation of the 7 Alaska translators. The *Forfeiture* is being enforced by a United States Attorney in a *de novo* collection action that is pending in the United States District Court for the District of Alaska, Case No. A02-295. PCI submits that since the Commission does not now have the authority to issue forfeiture in this regard under Section 307(f), it should request the termination of the collection action in this matter.

⁹ To this extent the PCI case would appear to be a “purple cow” and Commission action in terminating this proceeding and reinstating the PCI licenses in accordance with the Act changes would have no significant precedential impact beyond the PCI proceeding,

Commission in the *Termination Order*. This refusal was based on the belief of PCI's President, Mr. David Becker, that PCI could continue to operate these translators while PCI's appeal was pending before the U. S. Court of Appeals for the District of Columbia Circuit pursuant to the provisions of Section 307(c)(3) of the Communications Act.¹⁰ The Presiding Officer also found PCI was relying on a Commission general practice of permitting continued broadcasting pending completion of an appeal by licensed broadcast stations in such proceedings:

Generally, we permit a disqualified broadcast licensee to continue operations during judicial appeals to ensure service to the public until the court resolves the licensee's qualifications.

Pinelands, Inc., 7 FCC Red 6058, 6061 n.12 (1992).¹¹ The Presiding Officer acknowledged this was the normal Commission policy.¹² However, in PCI's case the Commission opted to refuse to allow PCI to continue the operation of the translators pending appeal.¹³

15. The Presiding Judge found that the word "generally" used by the Commission in *Pinelands, supra*, is a qualifier that shows a selective decision for allowing interim broadcast operation pending appeals. Discretion for the Commission to decide who can and who cannot operate pending judicial appeal does not appear anywhere in the Communications Act, the rules, or Commission policy, but there has never been a case where a licensee was denied the right to continue licensed operations

contrary to the unsupported assertions of KSRM.

¹⁰ ID page 16-17.

¹¹ ID, *supra*.

¹² ID, *supra*.

¹³ ID, *supra*.

pending appeal.¹⁴ As a result, Mr. Becker believed that it was wrong for the Commission to order PCI's 7 translators off the air, and contrary to the public interest considerations that were cited in *Pinelands*.

16. As it turns out, Mr. Becker has been vindicated. Less there be any further doubt about the intent of Congress in this regard, the modifications to Section 307(c)(3) now make it abundantly clear that broadcast licensees are authorized to continue to operate their stations while any administrative or judicial appeal is pending in connection with any application for license renewal, as in the case of the 7 Alaska translators. Section 307(c)(3) now clearly provides:

Pending any administrative or judicial hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 or section 402 of this title, the Commission shall continue such license in effect.¹⁵

17. While the Commission, and the Federal courts¹⁶, have construed a perceived vagueness in the language of former Section 307(c)(3) to allow discretion in the Commission to order the termination of the operation of broadcast stations while appeals of adverse licensing applications are pending before the Commission and/or the courts, the Congress has now made it clear that the Commission has no such discretion. The Commission should not hold PCI liable for fines and license revocations when it was

¹⁴ ID, *supra*

¹⁵ These are requests for hearing by the Commission (47 USC 405) and appeals to Federal courts (47 USC 402).

¹⁶ *Peninsula Communications, Inc. v. F.C.C.*, No. 01-1273, *per curiam Judgment and Memorandum*, filed January 30, 2003 (D.C, Cir 2003) and *United States of America v. Peninsula Communications, Inc.*, 287 F.3d 832 (9th Cir. 2002).

correct in its interpretation of the intent of Congress in enacting Section 307(c)(3), as shown in the recent amendment thereto.

18. KSRM argues that even though the changes in the Communications Act may have been adopted and may inure to the benefit of PCI, and the Commission is duty bound to comply therewith, such action would be "unfair" to "...competitors who have suffered over the past decade as a result of PCI's illegal operations." PCI has been the subject of this Commission regulatory proceeding since 1995, and has twice been forced to defend itself before the U.S. Court of Appeals for the District of Columbia, as well as the U.S. Court of Appeals for Ninth Circuit. It has expended thousands of dollars in funds on this matter. The subject changes to the Communications Act clearly signal that the Congress believes enough is enough in this proceeding and PCI should be returned to the *status quo ante bellum*.

Respectfully submitted,

Peninsula Communications, Inc.

By: _____

Jeffrey D. Southmayd

Its Attorney

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Date: January 14, 2005

ATTACHMENT A

**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

MAR 4 1995

**IN REPLY REFER TO
124284-AJS**

**Peninsula Communications, Inc.
David F. Becker, President
P.O. Box 109
Homer, Alaska 99603-0109**

**In re: FM Translator Stations
K257DB, Anchor Point/Seldovia
K265CK and K292ED, Kachemak City
K272CN and K285DL, Homer
K272DG and K285EG, Seward
K274AJ and K285AA, Kodiak,
K283AB, Soldotna
K285EF, Kenai**

Dear Licensee:

An examination of Peninsula's recently filed renewal applications indicate that Peninsula may be in violation of the Commission's revised ownership and support rules governing commercial FM translator stations. See 47 C.F.R. Secs. 74.1232(d) and (e). If this is in fact the case, Peninsula must immediately divest itself of its ownership and support interests in all non-complying stations.

More specifically, from Peninsula's responses to questions 5(a) and (b)¹ of the license renewal applications for the above referenced FM translator stations, it appears that Peninsula is serving areas outside of the primary contour service areas of the stations being rebroadcast. Such service is impermissible unless: (1) these translator stations are providing fill-in service; (2) are providing first aural broadcast service to "white areas;" or (3) are providing needed

¹ Questions 5(a) and (b) were added to the license renewal application form to help verify compliance with revised rule Sections 74.1232(d) and (e). These sections provide generally that an authorization for an FM translator station whose coverage contour extends beyond the protected contour of the commercial primary station being rebroadcast will not be granted to or cannot be supported by the licensee or permittee of a commercial FM radio broadcast station. Similarly, such authorizations will not be granted to and cannot be supported by any person or entity having any interest whatsoever, or any connection with a primary FM station. Interested and connected parties extend to group owners, corporate parents, shareholders, officers, directors, employees, general and limited partners, family members and business associates.

service to small, isolated Alaskan communities otherwise deprived of aural broadcast services.²

If Peninsula seeks to continue to own and operate these translators in its own right, it must submit a showing, supported by appropriate documentation, that one of the above three circumstances exist. Otherwise, Peninsula must divest itself of these stations and, in fact, should have done so by June 1, 1994. As background information to this requirement, Peninsula is directed to refer to the relevant Commission documents: Notice of Inquiry in the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 3 FCC Rod 3664 (1988); Report and Order in the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 5 FCC Rod 7212 (1990) ("Report and Order"), modified, 6 FCC Rod 2334 (1991), recon. denied, 8 FCC Rod 5093 (1993).

If Peninsula intends to seek a waiver of Section 74.1232(d) in order to serve white areas, it must first demonstrate that the proposed areas of service currently receive no other radio signals. In this regard, Peninsula should provide a clearly labeled, composite map for each translator station. Each composite map should reflect the authorized service contour of the existing translator station and its location. This "Authorized Contour" should be based on the MERP and corresponding HAAT set forth in Sections 74.1235(b)(1) and (2) of the rules. The composite map should also reflect a "Proposed Contour," reflective of the area Peninsula is currently actually serving. Finally, the composite map should reflect the 1 mV/m contours of all FM broadcast stations and the appropriate groundwave signal strength contours (Section 73.182(d) of the Commission's Rules) of all AM broadcast stations located within 25 miles (40 kilometers) of Peninsula's existing transmitter site, with each contour identified by call sign and city.

If Peninsula intends to seek a waiver pursuant to our Alaska exception policy, it must demonstrate anew, for each translator, that the translator is needed to provide service to small, isolated communities.³ It must show the areas and communities being served, the square

² The Commission has on a number of occasions recognized the unique nature of the communications industry in Alaska and the distinct lack of adequate communication services in the state. In Wrangell-Radio Group, 75 FCC 2d 404 (1979), the Commission granted applications proposing satellite-fed TV translators in seven Alaska communities. The Commission based its decision on the need for additional over-the-air broadcast signals to serve small, isolated communities in the state, and the fact that without special considerations for the implementation of service, many of these Alaskan communities would be without off-the-air broadcast service as we know it in the lower 48 states. For these same reasons, waivers of our FM translator rules have often been granted.

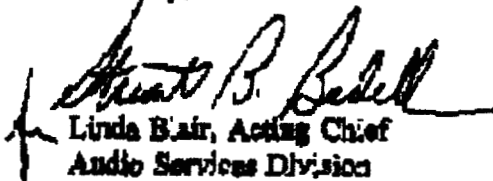
³ Although Peninsula has previously been granted waivers under our Alaska policy exception, the underlying basis for these grants was our understanding that the subject translators would be providing service to small, isolated communities in Alaska that would otherwise be deprived of any radio service and that no existing or potential full service

mileage and population of these areas, and all radio services (AM, FM, and FM translators) already being received in these areas.

If Peninsula intends to demonstrate that all or part of these translator stations are providing fill-in service, it must provide a clearly labeled, composite map for each translator station. Each composite map should reflect the authorized service contour of the existing translator station and its location. This "Authorized Contour" should be based on the MERP and corresponding HAAT set forth in Sections 74.1235(b)(1) and (2) of the rules. The composite map should also reflect the primary service station's 60 dBu (1mV/m) service contour, with the fill-in area clearly labeled.

Accordingly, for the reasons stated above and pursuant to 47 C.F.R. Section 0.285, Peninsula Communications, Inc. IS DIRECTED TO SUBMIT THE REQUESTED INFORMATION IN WRITING within 30 days of the date of this letter. Failure to file the requested information within 30 days could result in dismissal of Peninsula's renewal applications, pursuant to 47 C.F.R. Section 73.3568(b).

Sincerely,


Linda Blair, Acting Chief
Audio Services Division
Mass Media Bureau

cc: Jeffrey D. Southmayd

re: . . . Alaska, two

stations would be affected. However, a recent examination of Peninsula's station files indicate that it may be serving well populated areas and that these areas may be better served by full service local broadcast stations. Additionally, Peninsula should be mindful that any existing waivers were granted before the new rules became fully effective. Hence, any waivers granted prior to June 1, 1994 must now be considered under the Commission's more restrictive ownership and support rules.

CERTIFICATE OF SERVICE

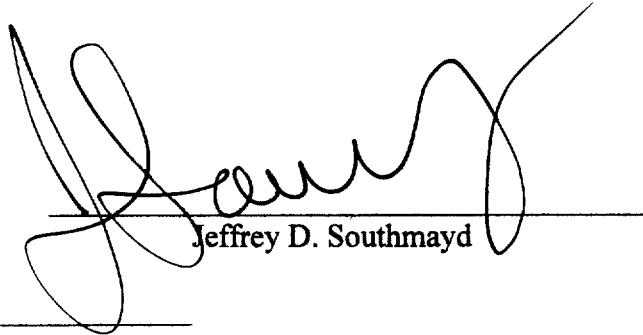
I hereby certify that copies of the foregoing were sent by first class United States mail, postage pre-paid, and email on this 14th day of January, 2005:

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Ms. Judy Lancaster*
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Jeffrey D. Southmayd

* Via email.